RECORD AND BRIEFS

No. 16-1220

FILED
JUN 5 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com

SCOTT A. SHER
BRADLEY T. TENNIS
WILSON SONSINI GOODRICH & ROSATI, P.C.
1700 K Street, N.W., Fifth Floor
Washington, D.C. 20006
(202) 973-8800

Attorneys for Respondents

June 5, 2017

Library of Congress
Law Library

QUESTIONS PRESENTED

1. Whether a federal appellate court may review a federal district court's decision to exercise jurisdiction over a case under Federal Rule of Civil Procedure 12(b)(1), consistent with unanimous federal practice since the earliest days of the federal judiciary.

2. Whether this Court should review the Second Circuit's narrow decision granting deference to the formal statement of a foreign government on the meaning and operation of its regulatory regime where that conclusion is wholly consistent with this Court's decision in *United States v. Pink*, 315 U.S. 203 (1942), and does not conflict with any decision of any other circuit.

3. Whether this Court should overturn decades of precedent and eliminate international comity abstention in the antitrust class-action context—a question Petitioners did not raise below.

PARTIES TO THE PROCEEDING

Petitioners are Animal Science Products, Inc. and The Ranis Company, Inc., plaintiffs-appellees below.

Respondents are Hebei Welcome Pharmaceutical Co. Ltd. and North China Pharmaceutical Group Corporation, defendants-appellants below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 11

I. PETITIONERS' ASSERTIONS THAT THE PANEL SHOULD NOT HAVE REVIEWED THE DISTRICT COURT'S MOTION TO DISMISS ORDER DO NOT PRESENT A QUESTION MERITING THIS COURT'S REVIEW 11

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED A TRUE CONFLICT BETWEEN U.S. AND CHINESE LAW, AND THERE IS NO CIRCUIT SPLIT ON THE NARROW ISSUE DECIDED IN THE OPINION BELOW 16

III. THERE IS NO REASON TO DISTURB SETTLED LOWER COURT LAW ON THE APPLICABILITY OF INTERNATIONAL COMITY IN ANTITRUST CLASS ACTIONS 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott v. Abbott,
560 U.S. 1 (2010) 20

Access Telecom, Inc. v. MCI Telecomms. Corp.,
197 F.3d 694 (5th Cir. 1999) 20

Allstate Life Ins. Co. v. Linter Grp. Ltd.,
994 F.2d 996 (2d Cir. 1993) 13

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 15

Bellotti v. Baird,
428 U.S. 132 (1976) 13

Bennett v. Pippin,
74 F.3d 578 (5th Cir. 1996) 15

Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.,
581 U.S. __,
137 S. Ct. 1312 (2017) 15, 33

Briscoe v. Bell,
432 U.S. 404 (1977) 14

Capron v. Van Noorden,
6 U.S. 126 (1804) 3

Chavez v. Carranza,
559 F.3d 486 (6th Cir. 2009) 22, 23

ClearOne Commc'ns, Inc. v. Biamp Sys.,
653 F.3d 1163 (10th Cir. 2011) 14

Daewoo Motor Am., Inc. v. Gen. Motors Corp.,
459 F.3d 1249 (11th Cir. 2006) 12

Empagran S.A. v. F. Hoffmann-La Roche Ltd.,
417 F.3d 1267 (D.C. Cir. 2005) 31

F. Hoffmann-La Roche Ltd v. Empagran S.A.,
542 U.S. 155 (2004) 24, 30

Fortino v. Quasar Co., a Div. of Matsushita Elec. Corp. of Am.,
950 F.2d 389 (7th Cir. 1991) 13

Hartford Fire Ins. Co. v. California,
509 U.S. 764 (1993) 17, 29, 31, 32

Indus. Inv. Dev. Corp. v. Mitsui & Co.,
671 F.2d 876 (5th Cir. 1982),
vacated, 460 U.S. 1007 (1983) 31

In re Gollehon,
No. CO-14-031,
2015 WL 1746496
(B.A.P. 10th Cir. Apr. 17, 2015) 15

In re Lorazepam & Clorazepate Antitrust Litig.,
631 F.3d 537 (D.C. Cir. 2011) 15

In re Monosodium Glutamate Antitrust Litig.,
477 F.3d 535 (8th Cir. 2007) 31

In re Oil Spill by the Amoco Cadiz Off the Coast of Fr. on March 16, 1978,
954 F.2d 1279 (7th Cir. 1992) 23

In re Uranium Antitrust Litig.,
617 F.2d 1248 (7th Cir. 1980) 31

In re Vitamin C Antitrust Litig.,
584 F. Supp. 2d 546 (E.D.N.Y. 2008) 8

In re Vitamin C Antitrust Litig.,
810 F. Supp. 2d 522 (E.D.N.Y. 2011) 8

In re Vitamin C Antitrust Litig.,
No. 06-md-1738 (BMC)(JO),
2012 WL 4511308
(E.D.N.Y. Oct. 1, 2012) 9

In re Vitamin C Antitrust Litig.,
No. 06-md-1738 (BMC)(JO),
2013 WL 6191945
(E.D.N.Y. Nov. 26, 2013) 9

In re Vitamin C Antitrust Litig.,
837 F.3d 175 (2d Cir. 2016) 10

JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.,
412 F.3d 418 (2d Cir. 2005) 11

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"),
313 F.3d 70 (2d Cir. 2002) 23

Mannington Mills, Inc. v. Congoleum Corp.,
595 F.2d 1287 (3d Cir. 1979) 10, 17, 25

McKesson Corp. v. Islamic Republic of Iran,
672 F.3d 1066 (D.C. Cir. 2012) 21, 22

McKesson HBOC, Inc. v. Islamic Republic of Iran,
271 F.3d 1101 (D.C. Cir. 2001),
vacated in part,
320 F.3d 280 (D.C. Cir. 2003) 22

Moore v. Sims,
442 U.S. 415 (1979) 14

Morrison v. Nat'l Austl. Bank Ltd.,
561 U.S. 247 (2010) 30, 31

Mujica v. AirScan Inc.,
771 F.3d 580 (9th Cir. 2014),
cert. denied, 136 S. Ct. 690 (2015) 28

Nolfi v. Ohio Ky. Oil Corp.,
675 F.3d 538 (6th Cir. 2012) 14

O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.,
830 F.2d 449 (2d Cir. 1987) 10

Ohio Forestry Ass'n, Inc. v. Sierra Club,
523 U.S. 726 (1998) 13

Plymouth Dealers' Ass'n v. United States,
279 F.2d 128 (9th Cir. 1960) 17

Raines v. Byrd,
521 U.S. 811 (1997) 14

Republic of Philippines v. Westinghouse Elec. Corp.,
43 F.3d 65 (3d Cir. 1994) 28

RJR Nabisco, Inc. v. European Cmty.,
136 S. Ct. 2090 (2016) 33

Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa,
482 U.S. 522 (1987) 28

Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.,
549 F.2d 597 (9th Cir. 1976) 10, 17, 25

Trugman-Nash, Inc. v. N.Z. Dairy Bd.,
954 F. Supp. 733 (S.D.N.Y. 1997) 12

Underhill v. Hernandez,
168 U.S. 250 (1897) 26

United States v. Co tainer Corp. of Am.,
393 U.S. 333 (1969) 17

United States v. McNab,
331 F.3d 1228 (11th Cir. 2003) 20, 21, 25

United States v. Pink,
315 U.S. 203 (1942) 1, 19

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) 17

United States v. Trenton Potteries Co.,
273 U.S. 392 (1927) 17

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983) 16

Zivotofsky ex rel. Zivotofsky v. Clinton,
566 U.S. 189 (2012) 4

STATUTES

15 U.S.C. § 1 ..... 7, 17

RULES

Fed. R. Civ. P. 12(b)(1) 3, 7, 12, 14, 15

Fed. R. Civ. P. 12(b)(6) 7, 14, 15

Fed. R. Civ. P. 50(a) 9, 13

Fed. R. Civ. P. 50(b) 9

OTHER AUTHORITIES

1B PHILLIP E. AREEDA & HERBERT HOVENKAMP,
ANTITRUST LAW (4th ed. 2016) 29

Benjamin G. Bradshaw, et al., *International Comity in the Enforcement of U.S. Antitrust Law in the Wake of In re Vitamin C*, 31 ANTITRUST 87 (2017) 29

Brief of *Amicus Curiae* The Republic of El Salvador in Support of Appellant, *Chavez v. Carranza*, Case No. 06-6234 (6th Cir. Apr. 18, 2008) 22

H.R. Rep. No. 97-686 (1982) 31

Restatement (Fourth) of Foreign Relations Law of the United States (Am. Law Inst., Tentative Draft No. 2, Mar. 22, 2016) 33

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) 10, 29

U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (2017) 30

INTRODUCTION

Seventy-five years ago in *United States v. Pink*, 315 U.S. 203 (1942), this Court affirmed a fundamental principle of respect for foreign governments' explanations of the meaning of their own laws and regulations before U.S. courts. In the proceedings in this case, the district court failed to adhere to *Pink* and rejected the formal representations of a foreign government as to the meaning of its own laws. The district court essentially permitted private class-action attorneys to use the federal courts to contest a foreign sovereign's regulatory regime.

The U.S. Court of Appeals for the Second Circuit properly disapproved of the district court's approach, holding that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 25a. The Second Circuit's unanimous decision comports with this Court's precedent, cogently harmonizes appellate case law, creates no division of authority, and provides clear guidance to the lower courts hearing cases that implicate comity concerns. It thus raises no issue meriting this Court's review.

This case arises against the backdrop of China's attempt to modernize its economy in an orderly way. The government of the People's Republic of China has closely regulated a number of key industries for many years to ensure a smooth transition from a centralized command economy to a socialist market economy. As part of this transition,

the relevant government Ministry [1] established a regulatory framework that directed Chinese vitamin C producers to reach agreement on minimum export prices and to observe export volume restrictions. Years later, Petitioners filed a private antitrust class action in the United States alleging that Respondents and other Chinese vitamin C manufacturers had conspired to fix prices. The Ministry made an unprecedented appearance before the district court in support of Respondents' motion to dismiss to explain that Chinese law in fact required the conduct at the root of Petitioners' antitrust complaint: an agreement to coordinate pricing.

The district court did not afford the Ministry's interpretation of its own laws the respect required by this Court—the same respect that the U.S. Government would expect when explaining U.S. law to a foreign court. Discounting the Ministry's description of a regime created through its own exercise of sovereign authority to regulate the Chinese economy, the district court instead relied on its own assessment of China's complex, unfamiliar regulatory system. The district court adopted a view of Chinese law directly contrary to the Ministry's and allowed the case to proceed to trial—without allowing the jury the benefit of even considering the Ministry's explanation. The trial proceedings resulted in a judgment requiring Respondents to pay over $150 million for conduct that the Chinese government clearly stated was required by Chinese law.

---

[1] Both the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") and Ministry of Commerce ("MOFCOM"), MOFTEC's successor entity, issued regulations relevant to this case. For simplicity, both are herein referred to as "the Ministry."

Unsurprisingly, this intrusion of U.S. class-action lawyers into China's domestic economic regulation strained relations between the two countries: while Respondents' appeal was pending below, the Chinese government relayed its objection to the U.S. Department of State in an official diplomatic statement, and the Ministry reaffirmed its interpretation of its own regulations. The Second Circuit properly corrected the district court's error by giving appropriate deference to the Ministry's explanation and concluding that international comity required that the case be dismissed.

No issue identified by Petitioners merits this Court's review. *First*, in challenging the Second Circuit's review of Respondents' motion to dismiss, Petitioners disregard the fact that international comity abstention represents a threshold determination for resolution under Federal Rule of Civil Procedure 12(b)(1), not an issue whose resolution depends on further developments at trial. This Court has held since its earliest cases that vacating a trial judgment and remanding with instructions to dismiss is the appropriate way to resolve the district court's improper exercise of jurisdiction. *See Capron v. Van Noorden*, 6 U.S. 126, 127 (1804). The Second Circuit did not err in following that approach, and no other court of appeals has deviated from it.

Second, the decision below comports with this Court's decades-old guidance in *Pink* and the decisions of other lower courts that have considered explanations of foreign law offered to a U.S. court by a foreign sovereign. The Second Circuit properly relied on the Ministry's construction of its own regulatory regime to hold that a true conflict existed between Chinese and U.S. law that, together with a

number of other factors balancing competing U.S. and Chinese interests, required the district court to abstain from exercising jurisdiction on international comity grounds. The court's decision is narrow. The high level of deference to a foreign government's view of its own laws is required only when the foreign government directly participates in the case to articulate its position in a sworn evidentiary proffer and where that position is reasonable. Nothing in the Second Circuit's reasoning on this point merits review in this Court.

Third, lower courts have consistently recognized that, in rare circumstances like this, federal courts should abstain from exercising jurisdiction on international comity grounds. Petitioners never argued (or even suggested) below that the international comity doctrine no longer applies to antitrust actions, and no holding from this Court or any court of appeals supports such a rule. The Court should therefore reject Petitioners' request that it entertain academic speculation that Petitioners themselves never even advanced below. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) ("Ours is a court of final review and not first view.") (citation omitted).

Petitioners fail to identify any issue warranting this Court's review. The petition should be denied.

STATEMENT OF THE CASE

1. Petitioners, plaintiffs and appellees below, are Animal Science Products, Inc. and The Ranis Company, Inc., class representatives for (1) a class of direct and indirect purchasers of vitamin C seeking injunctive relief and (2) a class of direct purchasers of vitamin C seeking damages for alleged overcharges.

Respondents, defendants and appellants below, are Hebei Welcome Pharmaceutical Co. Ltd. ("Welcome"), a Chinese vitamin C manufacturer, and North China Pharmaceutical Group Corporation ("NCPG"), a holding company that owns a minority share of North China Pharmaceutical Co. Ltd., which in turn holds a majority share of Welcome. NCPG disputes the U.S. courts' personal jurisdiction over it in this case.

2. Since 1989, the Ministry has regulated foreign trade in medicinal products by Chinese companies through the Chamber of Commerce of Medicines and Health Products Importers & Exporters (the "Chamber"). The Chamber is established and overseen by the Ministry and "must implement . . . administrative rules and regulations relating to foreign trade and economy" as part of its "coordination and industry regulation" functions. Dkt. 167-3 at 16, Case No. 13-4791 (2d Cir. July 28, 2014). Unlike similarly named organizations in the United States, the Chamber is an instrument of the government. The Ministry exercises plenary authority over the Chamber, including by selecting or approving senior Chamber officials (often drawn from Ministry staff), approving the Chamber budget, and requiring the Chamber to submit annual plans and records of important meetings and activities for review.

Chinese vitamin C manufacturers were subject to two regulatory regimes established and supervised by the Ministry and the Chamber during the relevant time period of this case. In 1997, the Ministry issued the Notice Relating to Strengthening the Administration of Vitamin C Production and Export by Ministry of Foreign Trade and Economic Cooperation and State Drug Administration (Nov. 27, 1997). The 1997 Notice directed the Chamber to

establish a Vitamin C Sub-Committee responsible for "coordinating the Vitamin C export market, price and customers of China, to improve the competitiveness of Chinese Vitamin C produc[t] in the world market and promote the healthy development of Vitamin C export of China." Dkt. 154-2 at 86, Case No. 13-4791 (2d Cir. July 28, 2014).

In 2002 a new Ministry notice superseded the 1997 Notice and established a regulatory system known as "price verification and chop" ("PVC"). The 2002 Notice was issued to avoid antidumping complaints from foreign governments and facilitate China's entry into the World Trade Organization, while maintaining the Ministry's efforts to direct an orderly transition to a socialist market economy. Under the PVC system, the General Administration of Customs would permit exports of vitamin C only if the relevant contract had received approval from the Chamber in the form of a "chop." The Chamber's chop signified that the contract complied with Ministry and Chamber requirements, including by setting a price at or above the minimum price set by coordination through the Chamber.

The Ministry explained below that vitamin C exporters were required under both the 1997 and 2002 regimes to coordinate on prices and export volumes. Contrary to Petitioners' claim, Pet. 11, the Ministry's brief established that it was authorized to interpret the relevant Chinese regulations. The Ministry explained that it is the equivalent of a cabinet-level department in the U.S. Government system and that it "drafts and enforces laws and regulations governing domestic and foreign trade, and regulates market operation to achieve an integrated, competitive and orderly market system." Dkt. 69 at 1, Case No. 06-md-01738 (E.D.N.Y. Sept.

22, 2006). The Ministry promulgated the notices establishing the regulatory regimes at issue in this case and directed and oversaw the Chamber's efforts to implement the requirements of those regimes.

The Ministry explained below that, under the 1997 Notice, it directly enforced price and export quantity coordination through an export licensing system. In 2002, to implement the new regulatory system for vitamin C, the Sub-Committee enacted a revised charter. The Sub-Committee remained obligated to "coordinate[] and guide[] vitamin C import and export activities, promote[] self-discipline in the industry, maintain[] the regular order of vitamin C import and export operations, and protect[] the interests of the state, the industry and [its] members." Dkt. 154-2 at 89, Case No. 13-4791 (2d Cir. July 28, 2014). The Chamber's responsibilities continued to be to "coordinate and guide the import and export of medicines and health products[,] . . . maintain the order of foreign trade, defend fair competition, secure interests of the state and the trade[, and] safeguard lawful rights and interests of member organizations." *Id.* at 76.

3. Petitioners filed a class-action complaint against Respondents and other Chinese vitamin C manufacturers in the Eastern District of New York on January 26, 2005, alleging a conspiracy to fix prices and output volumes of vitamin C in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents argued that Chinese law compelled the conduct at issue and moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the basis of the foreign sovereign compulsion doctrine, the act of state doctrine, and/or international comity abstention. The Ministry appeared as *amicus curiae*—the first time any entity

of the Chinese government had ever done so before a U.S. court—and filed a brief supporting the motion. Pet. App. 6a n5. The Ministry stated that regulations promulgated under its authority required Chinese vitamin C manufacturers to agree on price and output levels to aid an orderly transition from a centralized command economy to a socialist market economy. Judge David G. Trager denied Respondents' motion, concluding that further factual development was required to evaluate the "ambiguous" record as to whether Respondents' conduct was in fact voluntary. 584 F. Supp. 2d 546, 557-59 (E.D.N.Y. 2008).

On summary judgment, Respondents reasserted the same three defenses. 810 F. Supp. 2d 522, 525-26 (E.D.N.Y. 2011). In addition to the Ministry's statements, Respondents offered expert reports by Professor Shen Sibao, Dean and Professor of Law at the University of International Business & Economics in Beijing and Dean of the Shanghai University Law School, and Professor James B. Speta, Professor of Law at Northwestern University. Professors Sibao and Speta explained that vitamin C was a regulated industry in China and that Ministry regulations required coordination on price. Petitioners did not offer a Chinese law expert of their own. 810 F. Supp. 2d at 526 n.5.

Judge Brian M. Cogan, assigned to the case after Judge Trager's passing, recognized that the Ministry was the "highest authority in China authorized to regulate foreign trade." *Id.* at 525. Nonetheless, Judge Cogan deemed the Ministry's statement "particularly undeserving of deference," *id.* at 551, and suggested that it was a "post-hoc attempt to shield defendants' conduct," *id.* at 552. The district court thus refused to defer to the Ministry's explanation, treating discrepancies between the

Ministry's statements and Petitioners' (mis)reading of Ministry and Chamber regulations as an invitation to "parse out [Respondents'] precise legal role within China's complex vitamin C market regulatory framework." Pet. App. 29a-30a. After conducting his own analysis of Chinese law, Judge Cogan concluded, contrary to the Ministry's explanation of its own regulations, that Respondents' conduct was not compelled. *Id.* at 553-67. The court denied Respondents' summary judgment motion on that basis. *Id.* at 525.

Trial was held from February 25, 2013 to March 14, 2013. Judge Cogan excluded much of the evidence supporting Respondents' compulsion defense at trial—including the Ministry's highly relevant and authoritative explanations of Chinese law—in an unpublished written order and several bench orders. 2012 WL 4511308 (E.D.N.Y. Oct. 1, 2012). The jury was ultimately asked only to decide whether there was "compulsion in fact," but, even on that limited question, the exclusion of the most relevant evidence hampered Respondents severely in their ability to present their defenses to the jury. The jury returned a verdict against Respondents, awarding pre-trebled damages of $54.1 million. Respondents moved orally for judgment as a matter of law under Rule 50(a) at the conclusion of trial and filed a written motion under Rule 50(b) after the jury verdict was returned. Respondents' Rule 50(b) motion identified the same three grounds advanced at the motion to dismiss and summary judgment stages. Judge Cogan again denied Respondents' motions. 2013 WL 6191945 (E.D.N.Y. Nov. 26, 2013).

4. Respondents filed a notice of appeal designating all prior judgments, orders, and opinions on December 23, 2013. As relevant to the decision

below, Respondents sought review of "[w]hether the district court erred in failing to dismiss the case on international comity and/or act of state grounds." Dkt. 175 at 3, Case No. 13-4791 (2d Cir. Aug. 11, 2014). While the appeal was pending, the Chinese government filed an official diplomatic statement with the U.S. Department of State, noting that the case was of "great importance" to China and again emphasizing that Chinese law compelled the Respondents' conduct. The Ministry again participated as an *amicus* before the Second Circuit. Diplomatic Correspondence between Embassy for the People's Republic of China and the United States Department of State, Dkt. 111-3, Case No. 13-4791 (2d Cir. May 23, 2014).

The Second Circuit issued its unanimous opinion on September 20, 2016. 837 F.3d 175 (2d Cir. 2016). The court held that the district court abused its discretion by not abstaining from exercising jurisdiction on international comity grounds. In particular, the court of appeals held that, given the Ministry's appearance in the case, the district court had erred by failing to give conclusive deference to the Ministry's reasonable interpretation of Chinese law, as required by this Court in *Pink*. Pet. App. 11a-12a. The Second Circuit applied the international comity balancing test developed by the circuit courts in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). *See also O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451-52 (2d Cir. 1987); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987). The Second Circuit concluded that the Ministry's explanation, together

with the record available at the motion to dismiss stage, established conclusively that it was impossible for Respondents to comply with both Chinese law and the Sherman Act. Pet. App. 27a-33a. In addition, the court found that each of the remaining *Timberlane* and *Mannington Mills* comity abstention factors "decidedly weigh[ed] in favor of dismissal and counsel[ed] against exercising jurisdiction in this case," Pet. App. 34a, a point which Petitioners never contested. Accordingly, the Second Circuit vacated the district court's judgment, reversed the order denying the motion to dismiss, and remanded with instructions to dismiss with prejudice. Pet. App. 38a.

Petitioners filed a petition for rehearing *en banc* on October 4, 2016, which was denied without noted dissent on November 4, 2016. Dkt. 259, Case No. 13-4791 (2d Cir. Nov. 4, 2016). The petition for a writ of *certiorari* followed.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' ASSERTIONS THAT THE PANEL SHOULD NOT HAVE REVIEWED THE DISTRICT COURT'S MOTION TO DISMISS ORDER DO NOT PRESENT A QUESTION MERITING THIS COURT'S REVIEW

1. Petitioners argue that the Second Circuit should not have reviewed Respondents' pre-trial motion to dismiss after trial was held and that Respondents' international comity arguments were not properly preserved in post-trial motions. Pet. 19-20, 22. But international comity abstention implicates a federal court's exercise of subject matter jurisdiction and is an issue for the court, not a jury. *See, e.g., JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005)

("International comity . . . involves not the choice of law but rather the discretion of a national court to decline to exercise jurisdiction over a case before it[.]"). Respondents therefore properly moved to dismiss principally under Rule 12(b)(1), arguing *inter alia* that the court should decline jurisdiction on the basis of international comity. Dkt. 67 at 2-3, 33, Case No. 06-md-01738 (E.D.N.Y. Sept. 22, 2006); *see also, e.g., Daewoo Motor Am., Inc. v. Gen. Motors Corp.*, 459 F.3d 1249, 1259 (11th Cir. 2006) (affirming dismissal on the basis of international comity in response to Rule 12(b)(1) motion); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 737 (S.D.N.Y. 1997) (dismissing antitrust claims for lack of jurisdiction based on *Timberlane* factors). Respondents appealed the denial of their motion to dismiss on international comity grounds to the Second Circuit, and Petitioners offer no compelling argument for disturbing the Second Circuit's decision to review that order.

2. International comity abstention was an explicit basis for Respondents' motion to dismiss. Respondents expressly appealed "all" pre-judgment orders, noted the failure to dismiss the case on international comity grounds among the questions presented on appeal, cited the standard of review for a denial of a motion to dismiss on international comity grounds, and asserted dismissal on comity grounds as specific headings in their opening and reply briefs. Nonetheless, prior to their petition for rehearing *en banc*, Petitioners never argued or even suggested that the Second Circuit could not review the order on Respondents' motion to dismiss or that Respondents had not properly preserved their international comity abstention argument. There is no reason for this Court to review a purely procedural

question that Petitioners never raised below. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998).

3. Petitioners claim for the first time before this Court that the comity issue was somehow waived because it was not presented in a motion under Federal Rule of Civil Procedure 50(a). Pet. 21-22. Petitioners waived their waiver argument by not presenting it below. And in any event, Petitioners' argument incorrectly conflates the compulsion issue—a factual defense tried to the jury—with the comity issue in which the jury has no role. Respondents raised the question of comity at all appropriate points before the district court. The comity issue was not put before the jury (as Rule 50(a) assumes) because it is an issue for the court, not an issue for the jury. Indeed, the jury did not consider comity at all and was not shown the most relevant evidence—Chinese regulations and the Ministry's explanation of their meaning.

Moreover, comity does not implicate jury-triable issues and instead goes to the threshold question of whether a court should decline to exercise jurisdiction over a matter. The law clearly allows appellate review of abstention of jurisdiction even where not adequately raised at the district court level. *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). Indeed, "abstention may be raised by the [appellate] court *Sua sponte*." *Id.* Courts have also routinely held that international comity issues cannot be waived. *See, e.g., Fortino v. Quasar Co., a Div. of Matsushita Elec. Corp. of Am.*, 950 F.2d 389, 391 (7th Cir. 1991) ("Comity . . . is an accepted reason for an appellate court to consider issues that would otherwise have been deemed waived because not raised in [a] timely fashion[.]"); *Allstate Life Ins. Co. v. Linter Grp. Ltd.*,

994 F.2d 996, 1000 (2d Cir. 1993) ("The presence of [New York forum selection and choice of law] clauses, however, does not preclude a court from granting comity where it is otherwise warranted."). The Second Circuit thus acted properly in reviewing Respondents' comity argument as a threshold challenge.

4. The decision below does not create a circuit split as this case does not present the issue suggested by Petitioners. Pet. 19-20. In fact, reversal with instruction to dismiss is among the more common dispositions on appeal, and it is the only appropriate course if the district court erred in exercising jurisdiction. *See Raines v. Byrd*, 521 U.S. 811, 830 (1997) (on direct appeal, vacating judgment of district court and "remand[ing] with instructions to dismiss the complaint for lack of jurisdiction"); *Moore v. Sims*, 442 U.S. 415, 434 (1979) (reversing judgment of district court and remanding with instructions to dismiss the case after finding district court should have abstained); *Briscoe v. Bell*, 432 U.S. 404, 415 (1977) (finding that courts below erred in finding they had jurisdiction and vacating with instructions to dismiss the complaint).

Petitioners rely on cases involving refusal to review pre-trial orders issued under Federal Rule of Civil Procedure 12(b)(6)—not jurisdictional challenges under Rule 12(b)(1). Pet. 20. In *Nolfi v. Ohio Kentucky Oil Corp.*, the Sixth Circuit held that after a trial on the merits has occurred, it could not review the district court's denial of a Rule 12(b)(6) motion to dismiss for failure to plead a Section 10(b) securities claim with sufficient particularity. 675 F.3d 538, 545 (6th Cir. 2012). In *ClearOne Communications, Inc. v. Biamp Systems*, the Tenth Circuit ruled that it would be improper to review a

denial of pre-trial motion to dismiss for failure to state a claim premised on the conclusion that additional factual development would be necessary. 653 F.3d 1163, 1172 (10th Cir. 2011). For the same reason, the Tenth Circuit declined to review the pre-trial order denying the appellant's Rule 12(b)(6) motion to dismiss seeking resolution of a purely legal question in *In re Gollehon*, No. CO-14-031, 2015 WL 1746496, at *5 (B.A.P. 10th Cir. Apr. 17, 2015). And in *Bennett v. Pippin*, the Fifth Circuit held that because "Rule 12(b)(6) measures the sufficiency of the plaintiff's allegations[,] a district court's denial of a Rule 12(b)(6) dismissal becomes moot" after a full trial on the merits. 74 F.3d 578, 585 (5th Cir. 1996).

By contrast, appellate courts routinely review, after a full trial on the merits, orders involving Rule 12(b)(1) motions to dismiss. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506-07 (2006) ("The objection that a federal court lacks . . . jurisdiction may be raised by a party . . . at any stage in the litigation, *even after trial and the entry of judgment*. By contrast, the objection that a complaint fail[s] to state a claim upon which relief can be granted . . . may not be asserted post-trial.") (citations omitted) (emphasis added); *In re Lorazepam & Clorazepate Antitrust Litig.*, 631 F.3d 537, 540-41 (D.C. Cir. 2011) ("As far as jurisdiction is concerned, it does not matter if he should have recognized this sooner. *Capron* holds that the parties cannot confer jurisdiction by consent."). Indeed, this Court has consistently called for resolving jurisdictional questions at the earliest possible stage. *Cf. Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. __, 137 S. Ct. 1312, 1314 (2017) (jurisdictional question involving foreign sovereign's immunity from suit should ordinarily be resolved "as near to the outset of

the case as is reasonably possible" (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983)). The Second Circuit's procedural approach thus conforms to the unanimous practice of federal courts reviewing threshold questions.

5. Finally, even if Petitioners correctly identified a circuit split—and they have not—this case is a poor vehicle for resolving it. Regardless of which order the Second Circuit reviewed, only one outcome was possible: dismissal.

The Second Circuit accepted the Ministry's views as conclusive for purposes of establishing a conflict between Chinese and U.S. law. Pet. App. 33a. In addition, the court found that the record available at the motion to dismiss stage was sufficient to decide that the remaining comity abstention factors "decidedly weigh[ed] in favor of dismissal and counsel[ed] against exercising jurisdiction[.]" *Id.* 34a. The record developed after the motion to dismiss stage was therefore irrelevant to the decision below, regardless of which specific district court order was reviewed. The Second Circuit's decision to review the motion to dismiss rather than the Rule 50 motions therefore was not dispositive. This fact further militates against review of the first question presented.

II. THE COURT OF APPEALS CORRECTLY RECOGNIZED A TRUE CONFLICT BETWEEN U.S. AND CHINESE LAW, AND THERE IS NO CIRCUIT SPLIT ON THE NARROW ISSUE DECIDED IN THE OPINION BELOW

1. Under the decisions of this Court and of the lower courts, abstention on international comity grounds is warranted where there is a "true conflict"

between U.S. and foreign law. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-98 (1993) (citation omitted); *see also Mannington Mills*, 595 F.2d at 1297; *Timberlane Lumber*, 749 F.2d at 1384. A "true conflict" exists where foreign law requires activity "in some fashion prohibited by the law of the United States" or where "compliance with the laws of both [the United States and the foreign country] is otherwise impossible." *Hartford Fire*, 509 U.S. at 799.

2. Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy" that unreasonably restrains trade. 15 U.S.C. § 1. Agreements to set prices or output volumes are *per se* violations of Section 1. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). "Any combination which tampers with price structures is engaged in an unlawful activity." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940). It is the act of coordination itself—not agreement on any specific price or output level—that violates the Act. Even agreements to set "reasonable" prices or output levels are *per se* unlawful. *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969); *Socony-Vacuum*, 310 U.S. at 224 n.59; *see also Plymouth Dealers' Ass'n v. United States*, 279 F.2d 128, 132 (9th Cir. 1960) (use of "uniform list price in most instances only as a starting point, is of no consequence"; illegal per se because it "*was* a starting point" and "was in some instances . . . respected and followed").

The only relevant question is thus whether Chinese law required coordination on export price or volume. And Petitioners *conceded* this conflict in their briefing below: "Chinese law . . . required the Chamber and its Subcommittee to actively coordinate to set vitamin C export prices and quantities." Dkt. 174 at 25, Case No. 13-4791 (2d Cir. Aug. 11, 2014).

The Second Circuit, properly deferring to the Ministry's explanation of Chinese law and considering it together with the record on the motion to dismiss, reached the same conclusion.[2]

The Second Circuit observed that the Ministry's explanation established that vitamin C manufacturers were "compelled . . . to set and coordinate vitamin C prices and export volumes" under the 1997 Notice. Pet. App. 8a. It further concluded that Respondents' conduct was compelled under the 2002 PVC system. The 2002 Notice refers to "industry-wide negotiated prices" and states that "PVC procedure shall be convenient for exporters while it is *conducive for the chambers to coordinate export price and industry self-discipline*." Dkt. 154-2 at 66, Case No. 13-4791 (2d Cir. July 28, 2014). (emphasis added). The Second Circuit properly deferred to the Ministry's reasonable explanation that these references to "negotiated" and "coordinate[d]" prices mean that vitamin C manufacturers remained obligated under the 2002 Notice to negotiate and agree on a minimum export price. Pet. App. 27a. The Second Circuit further credited the Ministry's reasonable explanation that terms such as "industry self-discipline," "coordination," and "voluntary restraint" are terms of art of Chinese regulatory policy "connoting the government's expectation that private actors actively self-regulate to achieve the government's policy goals." *Id.* 28a. In other words, the PVC regime was a

---

[2] The Second Circuit recognized that in some cases a trial court may require discovery on the "countervailing interests and policies" before ruling on comity. In this case, however, the record available at the motion to dismiss stage was "sufficient to determine what Chinese law required and whether abstention was appropriate." Pet. App. 37a n.14.

decentralized means of regulation whereby the Ministry would adopt the export prices that the industry was directed to negotiate. *Id.*

The Second Circuit therefore concluded that there was a true conflict between U.S. and Chinese law because under both the 1997 and 2002 Notices, vitamin C manufacturers were required to coordinate to set a minimum export price and thereby violate the Sherman Act. Pet. App. 33a. The court properly rejected Petitioners' argument that there was a conflict only if Chinese law required agreement on a specific price, an argument wholly contrary to this Court's seminal decisions in *Trenton Potteries* and *Socony*, but which the district had accepted. *Id.* 28a, 32a-33a.

3. This Court's precedent calls for precisely the degree of deference to a foreign sovereign's statements regarding the meaning of their own laws that was applied by the Second Circuit. In *United States v. Pink*, the Court considered the extraterritorial effect of the Russian decrees of nationalization in light of a declaration from the Soviet Commissariat for Justice provided through diplomatic channels at the request of the United States. 315 U.S. at 219. Finding that the Commissariat was empowered to interpret Russian law, the Court "[did] not stop to review all the evidence in the voluminous record" and accepted the Commissariat's official declaration as "conclusive." *Id.* at 217-18, 220. Consistent with *Pink*, the Second Circuit held here that conclusive deference is due where (1) an entity of a foreign sovereign authorized to interpret the relevant law appears before a U.S. court and (2) offers an interpretation of the foreign sovereign's domestic law that is (3) reasonable under

the circumstances presented.[3] *Accord Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (accepting Chilean government's interpretation of Chilean domestic law).

4. There is no circuit split on the narrow issue decided by the Second Circuit—the degree of deference owed to a foreign government when it appears formally in a case. None of the cases cited by Petitioners conflicts with the Second Circuit's decision. In *Access Telecom, Inc. v. MCI Telecommunications Corp.*, defendants relied on an official circular produced outside of the litigation by a Mexican administrative agency. 197 F.3d 694, 714 (5th Cir. 1999). No agency representative appeared before the court at any stage in the proceedings to endorse the circular, and, in any event, it was not clear that the agency was authorized to interpret, rather than simply enforce, Mexican law. *Id.*; *cf.* Pet. App. 6a (the Ministry is the "highest authority within the Chinese government authorized to regulate foreign trade" and provided a statement on the meaning of regulations that the Ministry itself issued).

United States v. McNab did not even concern the meaning of Honduran law or a conflict between U.S. and Honduran law, and in any event it is clearly distinguishable. The question in *McNab* was merely whether Honduran regulations were valid during the relevant time period. 331 F.3d 1228 (11th Cir. 2003). The Honduran government had consistently

---

[3] Petitioners mistakenly contend that there was no "sworn evidentiary proffer" in this case. Pet. 17 n.5. As the Second Circuit noted, the "proffer" in this case is not the Ministry's amicus brief itself but the Mitnick Declaration attached to the brief, which provided authenticated copies of the regulations cited by the Ministry. Pet. App. 8a n.6.

represented that the defendants had violated valid Honduran regulations throughout the U.S. Government's investigation and prosecution of Lacey Act violations. *Id.* at 1233-35. Only after the defendants were convicted did the Honduran government change course and contend in an *amicus* brief filed by the Honduran Embassy that the underlying Honduran regulations were invalid. *Id.* at 1240. Faced with conflicting statements by Honduran government officials, the court conducted its own evaluation of the validity of the regulations at issue. *Id.* at 1242. In sharp contrast, in this case the Chinese government has consistently maintained that Respondents were required under Chinese law to coordinate export prices. Moreover, the Eleventh Circuit's decision expressly approved district courts generally deferring to the statements of "foreign officials charged with enforcing the laws of their country," deeming such statements to be "[a]mong the most logical sources for the court to look to in its determination of foreign law." *Id.* at 1241. The holding in *McNab* thus entirely aligns with the Second Circuit's approach.

Petitioners' reliance on *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012), is similarly misplaced. Iran conceded that Iranian law provided for a private cause of action under the Treaty of Amity but argued that the Treaty did not allow a plaintiff to invoke that cause of action in a U.S. court. Iran's arguments on this point concerned the text, context, and practical consequences of the Treaty, not Iran's domestic law. *Id.* at 1079-80. Moreover, Iran had offered numerous arguments and affidavits on various points of Iranian law in the course of a contentious, decades-long litigation arising under the Treaty of Amity, through

which Iran had voluntarily subjected itself to the jurisdiction of U.S. courts. *Id.* at 1070-72. The court properly declined to defer to Iran's interpretations that were inconsistent with its prior statements. *See, e.g., id.* at 1081-82 (finding that Iran's argument that its domestic law precluded liability for the actions of the government's agents was "fatally flawed" because it contradicted Iran's representations that the Treaty of Amity was *lex specialis* superseding Iranian general law); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1108-09 (D.C. Cir. 2001) (declining to defer to Iran's argument that Iranian law mandated a "come to the company" requirement for dividend payments in light of Iran's own affidavits stating merely that there was a strong presumption that Iranian companies would pay dividends in that way), *vacated in part*, 320 F.3d 280 (D.C. Cir. 2003). In this case, the Ministry's statement concerned the meaning of China's domestic laws and regulations, not a treaty, and its representations remained consistent throughout the litigation.

In *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009), the Republic of El Salvador filed an *amicus* brief arguing that a suit under the U.S. Alien Tort Claims Act and Torture Victims Protection Act should not proceed because it would interfere with the Salvadoran Amnesty Law. Brief of *Amicus Curiae* The Republic of El Salvador in Support of Appellant at 4-5, *Chavez v. Carranza*, Case No. 06-6234 (6th Cir. Apr. 18, 2008). In other words, the foreign government merely articulated a conflict between the goals of a domestic policy initiative and the proposed application of U.S. law. However, the brief pointed to no provision of the Amnesty Law suggesting that it was intended to preclude prosecution or liability

outside of El Salvador. Indeed, the Sixth Circuit noted that the Amnesty Law "*cannot* be interpreted to apply extraterritorially." 559 F.3d at 495 (emphasis added). Accordingly, the court was not bound to defer. *Cf.* Pet. App. 25a n.8 (deference may not be appropriate where a foreign sovereign's interpretation is not supported by "documentary evidence or reference of law" (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina")*, 313 F.3d 70, 92 (2d Cir. 2002)). Here, the Ministry offered a reasonable interpretation of specific ambiguous provisions of the relevant Chinese regulations. Pet. App. 27a-28a.

Finally, *In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992), cited by Petitioners as conflicting with the decision below, Pet. 26-27, in fact confirms the rule that conclusive deference is owed to a foreign sovereign when the conditions of the Second Circuit's holding are met. The Republic of France appeared as a party and offered an interpretation of an ambiguous provision of French law that the court confirmed was "plausible" based on the text of the provision. 954 F.2d at 1312. The court's observation that the French government had consistently advanced the same position in other disputes serves merely as confirmation that the French government's position in *Amoco* was reasonable. *Id.* Although the Seventh Circuit used language of "substantial deference," neither its conclusion nor its approach differs from the Second Circuit's below. *Id.* ("If all of the litigants were private parties, we would need to decide whether this understanding of the law is correct. But the Republic of France appears in this court and assures us that Article 16 applies to oil that reaches shore. . . . Giving the conclusions of a sovereign

nation less respect than those of an administrative agency [under *Chevron*] is unacceptable.").

In sum, each of the cases cited by Petitioners as inconsistent with the decision below either afforded similarly conclusive deference to the foreign sovereign or involved circumstances where (1) the foreign sovereign did not formally appear before the Court, (2) the foreign sovereign did not interpret its own domestic law, and/or (3) the foreign sovereign offered an obviously unreasonable interpretation under the circumstances. There is thus no conflict in the lower courts regarding the degree of deference owed to a foreign sovereign's interpretation of its own domestic law when formally presented to a U.S. court, and the Second Circuit's adherence to this Court's guidance in *Pink* does not warrant review.

5. Nor is there any reason to revisit the basic principle of deference affirmed in *Pink*. Indeed, this case exemplifies the need for a clear rule of conclusive deference given the "unique and complex nature of the Chinese legal- and economic-regulatory system and the stark differences between the Chinese system and ours." Pet. App. 29a. A clear rule of conclusive deference is particularly important in antitrust cases, which the Second Circuit recognized may present "unique international concerns." *Id.* 15a. The deference standard set out in *Pink* allows courts to more capably and credibly balance the competing sovereign interests at stake in antitrust cases involving foreign conduct: the U.S. Government's interest in protecting American commerce and foreign governments' interests in regulating their own economies. *Cf. F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's

ability independently to regulate its own commercial affairs.").

6. Petitioners' speculation that foreign governments might be improperly influenced to protect defendants in U.S. proceedings, Pet. 27-28, provides no reason for this Court's review. The passage Petitioners cite from *United States v. McNab* has no bearing on the issues presented by this case. The concern expressed by the Eleventh Circuit in *McNab* was that a foreign government might retroactively invalidate its laws to frustrate application of the Lacey Act, which depends upon violation of foreign law as a predicate. 331 F.3d at 1242. This has nothing to do with representations made by foreign governments as to the meaning of their existing laws before U.S. courts. Petitioners cannot point to any case where a foreign sovereign has subverted a U.S. tribunal by falsely asserting a conflict between its law and U.S. law or by manufacturing such a conflict for purposes of litigation.

In addition, courts already have the flexibility to take jurisdiction in appropriate cases, even where the court is bound to defer to a foreign sovereign's representation that there is a true conflict between U.S. and foreign law. The *Timberlane* and *Mannington Mills* comity balancing test applied below sets out additional relevant factors bearing on whether abstention is appropriate. *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane Lumber*, 549 F.2d at 614-15. The Second Circuit found that every one of these nine factors "decidedly weigh[s] in favor of dismissal and counsel[s] against exercising jurisdiction" in this case, Pet. App. 34a, and Petitioners have never disputed that conclusion.

Finally, defining a rule of law on the basis of speculation that a foreign government might improperly impede the application of U.S. law in a U.S. court is antithetical to the principles of foreign relations. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[C]ourts of one country will not sit in judgment on the acts of the government of another, done within its own territory."). The district court's speculation about the Chinese government's motives illustrates the problem. The Chinese government made an unprecedented appearance before a U.S. court to provide the district court with the benefit of a clear, authoritative explanation of Chinese law. Pet. App. 6a n.5. In return, the district court suggested that the Chinese government's chosen regulatory scheme was a "post-hoc attempt to shield defendants' conduct from antitrust scrutiny." *Id.* 121a-122a. The Chinese government subsequently filed an official diplomatic statement with the U.S. Department of State protesting its treatment and reconfirming the "great importance" it places on proper respect for its sovereignty before the courts of other nations. Diplomatic Correspondence between Embassy for the People's Republic of China and the United States Department of State, Dkt. 111-3, Case No. 13-4791 (2d Cir. May 23, 2014). This shows that diplomatic negotiations and multilateral institutions, not private lawsuits in federal court, provide the proper forum for resolving any concerns the United States may have with Chinese export policies.

The significant international tension caused by the district court's reasoning shows the wisdom of the rule of deference announced in *Pink* and faithfully applied by the decision below. Speculation about potential gamesmanship by foreign governments need not raise concerns, for the Second Circuit's

holding expressly requires that the proffered interpretation be "reasonable" to receive deference. The Court therefore has no cause to revisit that rule and every reason to allow the controversy presented by this case to end here.

III. THERE IS NO REASON TO DISTURB SETTLED LOWER COURT LAW ON THE APPLICABILITY OF INTERNATIONAL COMITY IN ANTITRUST CLASS ACTIONS

Petitioners' final question presented asks the Court to wade into an academic debate over the propriety of international comity abstention *vel non*. Whatever academic interest the question may hold, it does not in any way meet this Court's criteria for review.

1. As a threshold matter, Petitioners have waived their argument that international comity abstention should not apply on a case-by-case basis because they failed to raise it at any stage in the proceedings below. Respondents have consistently urged the courts below to dismiss this case as a matter of international comity. In response, Petitioners conceded that the doctrine remains valid, but argued only that comity abstention does not apply because the evidence of conflict, in their (incorrect) view, was insufficient. Petitioners have never argued (until now) that the multifactor test outlined in *Timberlane* and *Mannington Mills* can no longer be applied to abstain on a case-by-case basis. Even in their motion for rehearing *en banc*, with full knowledge of the Second Circuit's reasoning, Petitioners did not contend that the Second Circuit erred in analyzing international comity under that test.

Despite ample opportunity to do so, nowhere below have Petitioners argued that courts cannot abstain from exercising jurisdiction on a case-by-case basis. Petitioners should not be allowed to assert this argument for the first time before this Court.

2. Even if Petitioners had argued this issue below, Petitioners' request for relief would effectively eliminate the comity abstention doctrine as a judicial consideration. Such a result would overturn decades of settled law without justification.

This Court has long recognized that international comity is a fundamental judicial consideration guiding the exercise of jurisdiction in cases involving foreign parties: "[W]e have long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 546 (1987). Indeed, "the concept of international comity requires . . . a more particularized analysis of the respective interests of the foreign nation and the requesting nation[.]" *Id.* at 543-44.

The international comity test that was formulated in *Timberlane* and supplemented in *Mannington Mills* has been settled law in the lower courts for decades.[4] Indeed, it has been formally

---

[4] *See, e.g., Mujica v. AirScan Inc.*, 771 F.3d 580, 602-04 (9th Cir. 2014) (analyzing *Timberlane* factors even after finding true conflict not required for adjudicatory comity analysis), *cert. denied*, 136 S. Ct. 690 (2015); *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 76 (3d Cir. 1994) ("[A]ny exercise of jurisdiction to prescribe and enforce sanctions based on the effects of foreign activity in a domestic court requires the court to balance the interests it seeks to protect against the

adopted in Section 403 of the American Law Institute's *Restatement (Third) of Foreign Relations Law of the United States*. Although Professor Hovenkamp initially criticizes the *Timberlane* comity test, his treatise further acknowledges not only that it has been "well received," but also that courts *rarely* abstain from exercising jurisdiction on comity grounds. 1B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 273 (4th ed. 2016). The *Timberlane* test hardly provides the "get out of jail free card" that Petitioners imagine. Pet. 6. Rather, "the flexibility of the comity analysis allows courts to take into account the legal, political, and economic conditions that shape foreign defendants' actions." Benjamin G. Bradshaw, *et al.*, *International Comity in the Enforcement of U.S. Antitrust Law in the Wake of In re Vitamin C*, 31 ANTITRUST 87, 91 (2017).

Despite having had an opportunity to strike down the *Timberlane* multifactor test in *Hartford Fire*, this Court expressly refused to do so after finding no true conflict between American and British law. 509 U.S. at 799 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity."). Indeed, the Court's conflict of law analysis was consistent with the *Timberlane* test and with the analysis performed by the panel below. *See* Pet. App. 33a (analyzing remaining *Timberlane* comity factors after determining true conflict between U.S. and Chinese law).

---

interests of any other sovereign that might exercise authority over the same conduct." (citing *Timberlane*)).

Petitioners claim that the Court rejected the *Timberlane* test in *F. Hoffmann-La Roche Ltd v. Empagran S.A.* Pet. 31. Not so. *Empagran* addressed the extraterritorial application of the Foreign Trade Antitrust Improvements Act ("FTAIA"), not whether comity abstention would be appropriate in a particular case. *See* 542 U.S. at 168-69 (discussing whether independent foreign injury cases are within the scope of the FTAIA). The Court looked to the FTAIA's language and legislative history to determine whether Congress gave federal courts statutory jurisdiction to hear cases involving purely foreign conduct. *Id.* at 169-70. That is not at issue here. *See id.* at 172-73 (acknowledging that scope of FTAIA is a separate consideration from comity concerns under *Timberlane*). Before the Second Circuit, Respondents argued that the district court should have abstained from exercising jurisdiction in this case because Chinese law compelling Respondents' conduct conflicted with American antitrust law. The panel below dismissed this case on those grounds, not because of statutory jurisdiction concerns.[5]

Petitioners' remaining authority similarly does not address international comity abstention on a case-by-case basis. In *Morrison v. National Australia. Bank Ltd.*, the Court analyzed whether Section 10(b)

---

[5] This Court has noted that the U.S. Government may be able to obtain broader relief than private plaintiffs. *See Empagran*, 542 U.S. at 170 ("A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm."); *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION 25-26 (2017). But this case is brought by private plaintiffs, not the government.

of the Securities Exchange Act applies to cases involving securities traded on foreign exchanges. 561 U.S. 247, 261 (2010). The Court concluded that applying "judicial-speculation-made-law" was not appropriate and that instead, it should preserve "a stable background against which Congress can legislate[.]" *Id.* at 261.[6] But Congress has already legislated on the extraterritoriality of federal antitrust laws, and in doing so, made no change to the international comity abstention doctrine. *See Hartford Fire*, 509 U.S. at 798; H.R. Rep. No. 97-686, at 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the Foreign Trade Antitrust Improvements Act] would have no effect on the court['s] ability to employ notions of comity or otherwise to take account of the international character of the transaction." (citing *Timberlane*)).

3. Contrary to Petitioners' claims, Pet. 33-34, the opinion below preserves the distinction between a foreign sovereign compulsion defense and a true

---

[6] The additional cases Petitioners cite also address statutory jurisdiction, which is not at issue here. *See In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538-39 (8th Cir. 2007) (determining whether foreign purchases of allegedly price-fixed products were within the scope of the FTAIA); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (same). And in *Industrial Investment Development Corp. v. Mitsui & Co.*, the Fifth Circuit actually applied the *Timberlane* test. 671 F.2d 876, 885 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983). Petitioners' citation to *Industrial Investment Development Corp.* actually referred to *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1255 (7th Cir. 1980)—not *Timberlane*—and concerned the proper standard of review for a district court's decision as to whether to exercise extraterritorial jurisdiction, not whether courts should apply the *Timberlane* test. Pet. 32.

conflict for purposes of comity analysis. Whether Respondents' specific conduct—exporting vitamin C at the specific prices challenged by Petitioners—was compelled by Chinese law does not "weigh heavily" in a proper "true conflict" analysis. Pet. App. 32a-33a. The key question is whether "compliance with the laws of both countries is impossible"—that is, "whether the PVC regime, on its face, required [Respondents] to violate U.S. antitrust laws in the first instance." *Id.* (citing *Hartford Fire*, 509 U.S. at 799). The Ministry's statements, coupled with Petitioners' concession that Chinese law required coordination on price and output, resolve that question.

The panel below did not address Respondents' foreign sovereign compulsion defense and, as such, whether the Second Circuit would have ruled for Respondents on those grounds is irrelevant. *See* Pet. App. 37a-38a. The jury's factual finding on compulsion is of no concern because the most important evidence—China's statements that the conduct was compelled—was excluded from the evidence available to the jury. On the other hand, the Second Circuit found that the Ministry's official statements "should be credited and accorded deference" here. *See id.* 27a. The panel had no need to reach the compulsion defense, but there is no reason to believe the result would have been different had the court of appeals decided the case on compulsion grounds rather than comity.

4. The *amicus* brief of Professors Dodge and Stephan also fails to provide support for review of the third question presented. The *amici* rely on a section of the tentative draft of the Fourth Restatement that

has merely been presented "for discussion only."[7] Restatement (Fourth) of Foreign Relations Law of the United States, at xxi (Am. Law Inst., Tentative Draft No. 2, Mar. 22, 2016). As discussed above, Section 403 of the Third Restatement remains the official position of the American Law Institute. Further, the authorities relied on by the *amici* overlap with the cases cited by Petitioners and only address the extraterritorial scope of legislation, not whether a court should abstain from exercising jurisdiction in a particular case. *See* supra, at 28-30 (distinguishing *Empagran* and *Morrison*); *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2107-08 (2016) (discussing whether RICO applies to cases involving foreign injuries). There is simply no conflict between the decision below and these cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

---

[7] *Cf. Bolivarian Republic of Venez.*, 137 S. Ct. at 1321 (referencing different section of Restatement (Fourth) that has been "approved" and may be "cited as representing the Institute's position until the official text is published"); *see* Restatement (Fourth) of Foreign Relations Law of the United States § 455, Reporter's Note 12, at 9 (Am. Law Inst., Tentative Draft No. 2, Mar. 22, 2016). The portion cited by amici has not been approved.

Respectfully Submitted,

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1301 Avenue of the
Americas, 40th Floor
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com

SCOTT A. SHER
BRADLEY T. TENNIS
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1700 K Street, N.W.,
Fifth Floor
Washington, D.C. 20006
(202) 973-8800

June 5, 2017

Attorneys for Respondents